UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-SAJ **THE CARGILL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO AMEND ANSWERS TO ADD COUNTERCLAIMS**

Cargill, Inc. ("Cargill") and Cargill Turkey Production, LLC ("CTP") (together, the "Cargill Defendants") urge the Court to grant their motion for leave to amend their respective Answers to the Second Amended Complaint to assert against Plaintiffs CERCLA and related Oklahoma law counterclaims for contribution.

The Cargill Defendants respectfully disagree with Plaintiffs' contention that the landmark decision of "Atlantic Research did *nothing* to alter the law applicable to the State's claims in this case." (Dkt. No. 1477 at 1, emphasis in original.) Although few courts have had occasion to address the Atlantic Research holdings, and the full import of the decision is as yet unknown, the case, at a minimum, altered the way that PRPs should plead contribution allegations. See, e.g., Raytheon Aircraft Co. v. United States, 2007 U.S. Dist. LEXIS 54361, at *2 (D. Kan. July 25, 2007) (attached as Ex. 1) (reconsidering motion to dismiss a contribution claim after finding that Atlantic Research superseded Tenth Circuit precedent upon which the court had earlier relied for dismissal).

In their present motion, the Cargill Defendants seek only to articulate as counterclaims the same allegations they have already asserted as affirmative defenses; the motion for leave is

largely procedural rather than substantive. In a sense, then, Plaintiffs are correct in asserting that nothing has changed in this case. However pled, Plaintiffs may be held liable as PRPs.

ARGUMENT

This Court must liberally grant an amendment to the pleadings to add counterclaims when justice requires. See Smith Contracting Corp. v. Trojan Const. Co., 192 F.2d 234, 236 (10th Cir. 1951) (finding district court abused its discretion in refusing to allow additional counterclaim because such allowance is freely given where justice so requires). Absent a reason for denial "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment," this Court should grant the Cargill Defendants leave to add the proposed counterclaims. See Foman v. Davis, 371 U.S. 178, 182 (1962).[1] In particular, unless the amendment would cause prejudice to the opposing party, the Court should grant leave to amend. Waddell & Reed Fin., Inc. v. Torchmark Corp., 223 F.R.D. 566, 630 (D. Kan. 2004) (citation omitted). In this context, "prejudice ... means undue difficulty in defending a lawsuit because of a change of tactics or theories on the part of the other party." Id. (citations omitted).

In responding to the Cargill Defendants' request to assert contribution counterclaims, Plaintiffs all but ignore this standard, and instead rest entirely on their contentions that the motion is untimely and the request futile. These arguments fail; Plaintiffs point to no actual prejudice they would suffer by allowing the counterclaims to be pled and fail to show how the

[1] Notably, the Federal Rules Committee has published for comment its proposal to delete Rule 13(f), finding the subsection to be redundant of Rule 15(a). See http://www.uscourts.gov/rules/newrules1.htm. This district court already recognizes that reality. See Hear-Wear Techs., LLC v. Oticon, Inc., Case No. 07-CV-0212-CVE-SAJ, 2007 U.S. Dist. LEXIS 91365, at *7 (N.D. Okla. Dec. 12, 2007) (collecting cases).

request is futile. Because the Cargill Defendants offer plausible claims and have neither changed tactics nor theory so as to prejudice Plaintiffs, this Court should grant the motion.

A. Plaintiffs Misconstrue the Proposed Counterclaims.

Plaintiffs' legal argument has little to do with the actual claims proposed by the Cargill Defendants. Plaintiffs' primary argument is that they, as part of a governmental entity, are and have been allowed to bring a CERCLA § 107(a) claim against the Defendants regardless of whether Plaintiffs are themselves PRPs. (Dkt. No. 1477 at 3-7.) This argument about the claims that *Plaintiffs* can assert, comprising the majority of Plaintiffs' response brief, is entirely inapposite to the present motion. The Cargill Defendants' proposed counterclaims do *not* concern the claims Plaintiffs can assert against the Defendants, but *only* the Cargill Defendants' own claims that Plaintiffs are liable under CERCLA §§ 107(a) and 113(f) as PRPs. (Dkt. Nos. 1450-2 and 1450-3.)

As even Plaintiffs admit, "Atlantic Research may have finally resolved the issue of whether a private party that is a PRP may recover costs under certain circumstances under subparagraph (B) of CERCLA § 107(a) ..." (Dkt. No. 1477 at 4.) At the end of December, the District of Kansas explained that "until very recently, the majority of the courts that had addressed the issue, including the Tenth Circuit, had held that a section 107(a) claim for cost recovery was available only to the United States as the enforcer of CERCLA and to innocent parties and that PRPs could not pursue a section 107(a) claim against other PRPs for joint and several liability." Raytheon Aircraft Co. v. United States, __ F. Supp. 2d.__ , 2007 WL 4530820, 2007 U.S. Dist. LEXIS 94533, at *10 (D. Kan. Dec. 21, 2007) (citing Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169 (2004)) (attached as Ex. 2). However, in what commentators are calling "easily the most important [CERCLA] decision to date," Atlantic

Research undercut those prior decisions by holding that CERCLA authorizes cost recovery claims by PRP parties. C. Johnson, United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA, 22 J. Envtl. L. & Litig. 313, 313 (2007); Raytheon Aircraft, 2007 U.S. Dist. LEXIS 94533, at *10 (citing United States v. Atl. Research Corp., __ U.S. __, 127 S. Ct. 2331, 2336 (2007)).

In so holding, the Supreme Court also clarified the distinction between CERCLA §§ 107(a) and 113(f), and specifically recognized that "a defendant PRP in such a § 107(a) suit [brought by a plaintiff PRP] could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim." Atlantic Research, 127 S. Ct. 2331 at 2339 (citations omitted). The Court reasoned that "[r]esolution of a § 113(f) counter-claim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action." Id. The Raytheon Aircraft court further explained:

> [A] plaintiff-PRP is not automatically entitled to achieve a net recovery of all of its costs simply because joint and several liability is available under a section 107(a) claim. If the defendant-PRP shows that the plaintiff-PRP is overreaching and attempting to recover costs for which it is responsible, then the counterclaim for contribution will permit a reckoning.

2007 U.S. Dist. LEXIS 94533, at *15. The Cargill Defendants merely seek their chance at such "a reckoning" should Plaintiffs attempt to recover CERCLA costs for which Plaintiffs are themselves responsible.

A motion to amend is not the appropriate forum to litigate all the implications, broad and subtle, of the Atlantic Research case, particularly in the absence of any evidence of the *actual* conduct of either the Cargill Defendants or Plaintiffs. The Atlantic Research Court suggested that defendants assert counterclaims for contribution under CERCLA to blunt inequitable distribution, and the Raytheon Aircraft court discussed with approval just such a counterclaim.

The Court can address the precise application of the Supreme Court's decision to the facts here once the facts are actually placed before it. In the meantime, Rule 13(f)'s and Rule 15(a)'s liberal standards for amendment require that the Cargill Defendants be permitted to assert the claims.

B. The Court Should Grant the Timely Motion Because It Causes No Prejudice.

Plaintiffs' objection to the proposed amendment as untimely (Dkt. No. 1477 at 7-8) fails for several reasons. First, it is simply untrue. Indeed, barely six weeks ago, on December 21, 2007, the District of Kansas described the Atlantic Research decision as "very recently" changing the law of contribution under CERCLA. Raytheon Aircraft, 2007 U.S. Dist. LEXIS 94533, at *10. As far as the Cargill Defendants are aware, the Raytheon Aircraft court is the only court within the entire Tenth Circuit to have yet substantively addressed the implications of pleading contribution claims under Atlantic Research. The objective newness of the decision and the dearth of existing cases implementing the changed law undermine Plaintiffs' claim of untimeliness.

Second, Plaintiffs here can point to no prejudice from the proposed amendment. The legal and factual assertions underlying the proposed amendment have been part of the Cargill Defendants' pleadings since the earliest stages of the litigation. The Cargill Defendants have *always* argued that if they are found to be PRPs under the facts of this case, Plaintiffs themselves are likewise PRPs and, as a result, Plaintiffs are liable for statutory and common law contribution and their CERCLA claims should be barred. (Dkt. Nos. 51 and 52: Aff. Def. ¶¶ 14, 36, 48; Dkt. Nos. 1240 and 1241: Aff. Def. ¶¶ 14, 36, 48.) The Atlantic Research case merely requires reorienting those contentions into a different procedural posture.

Plaintiffs' bald assertion that the addition of the proposed counterclaims would nonetheless "plainly require additional discovery, briefing and expert reports" that "would substantially disrupt the course of the proceedings, unfairly burden the State, and result in delays" is baseless. (Dkt. No. 1477 at 8.) Notwithstanding their assertion, Plaintiffs have failed to provide even a *single* example of what additional discovery, briefing, or expert analysis they might possibly need or a single way in which the amendment would disrupt the proceedings. (Id. at 8-9.) Because the proposed counterclaims introduce no new legal or factual theories, the counterclaims would cause no delays and would not prejudice either Plaintiffs or the public interest they claim to advance in this suit.

Moreover, the Cargill Defendants brought this motion in the interest of consistency and judicial efficiency. Under Atlantic Research, the Cargill Defendants should now recast their affirmative defenses based on Plaintiffs' own culpable conduct as counterclaims for contribution under CERCLA § 113(f), and by extension under Oklahoma law, so as to prevent a potentially inequitable apportionment of the alleged response costs and damages. Should the Cargill Defendants be found liable under CERCLA without the ability to seek fair contribution in this same action from Plaintiffs for their own roles as PRPs, the Cargill Defendants and all Defendants would be forced to commence a separate lawsuit to recover the costs for which Plaintiffs are responsible. To avoid unnecessary, duplicative litigation, and the possibility of inconsistent results, and to streamline the process for all parties, the Court should grant the motion to amend to add the CERCLA and related common law contribution counterclaims, as justice requires. See Smith Contracting, 192 F.2d at 236.

C. The Proposed Amendments Are Not Futile.

A proposed counterclaim is futile if the new claims would not survive a motion to dismiss. E.g., Anderson v. Suiters, 499 F.3d 1228, 1238 (10th Cir. 2007) (citations omitted). The Supreme Court instructs that courts may dismiss a cause of action for failure to state a claim only when the factual allegations fail to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007); see also Shero v. City of Grove, 510 F.3d 1196, 1200 (10th Cir. 2007). To determine futility, the issue is not whether the Cargill Defendants will ultimately prevail, but whether they are "entitled to offer evidence to support the claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002) (quotation omitted). Under the necessarily liberal standard for amending pleadings, Plaintiffs make no sustainable argument that the Court should deny leave to amend based on alleged futility of the proposed CERCLA and related Oklahoma law counterclaims.

1. The Cargill Defendants' proposed CERCLA counterclaims are not futile.

First, the Cargill Defendants seek to assert CERCLA contribution counterclaims as specifically contemplated by the Supreme Court and as very recently endorsed by the District of Kansas. See Atlantic Research, 127 S. Ct. 2331 at 2339 ("a defendant PRP may trigger equitable apportionment by filing a § 113(f) counterclaim"); Raytheon Aircraft, 2007 U.S. Dist. LEXIS 94533, at *15 ("If the defendant-PRP shows that the plaintiff-PRP is overreaching and attempting to recover costs for which it is responsible, then the counterclaim for contribution will permit a reckoning.") Accordingly, the CERCLA counterclaims are "plausible on [their] face" and the Cargill Defendants are entitled to plead them. See Bell Atl., 127 S. Ct. at 1974.

Second, Plaintiffs assert that the Cargill Defendants have not alleged a prima facie case of Plaintiffs' liability under § 107(a), which is necessary for a successful § 113(f) claim (Dkt.

No. 1477 at 9), but fail to identify any element of the prima facie claim that the Cargill Defendants' pleadings omit. On the contrary, the proposed counterclaims fully comply with the prima facie test Plaintiffs' response itself quotes. See Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1135-36 (10th Cir. 2002).

The Court should also reject Plaintiffs' illogical assertion – offered without legal analysis or citation of any kind – that a party "plainly" cannot assert a CERCLA § 113(f) counterclaim for costs that it foreseeably may incur. (Dkt. No. 1477 at 9, n.5.) In fact, a party is free to seek contribution for future recoverable costs. See, e.g., Tosco Corp. v. Koch Indus., 216 F.3d 886, 891 (10th Cir. 2000) (affirming judgment for contribution for future investigation and remediation costs pursuant to CERCLA § 113(f) and Oklahoma law).

Similarly, to demonstrate that the Cargill Defendants' proposed CERCLA counterclaim seeking recovery of RCRA response costs would be futile, Plaintiffs must do more than make a blanket claim that they disagree. (See Dkt. No. 1477 at 9.) Rather, they must show that the proposed counterclaims fail to provide "plausible grounds" for a claim. See Shero, 510 F.3d at 1200 (quoting Bell Atl., 127 S. Ct. at 1965). As detailed in the opening brief, federal courts across the country have held that costs arising from RCRA compliance may be recovered under CERCLA, just as the Cargill Defendants seek to claim here. (See Dkt. No. 1450 at 7-9.)

Plaintiffs try to distinguish the entire body of case law addressing CERCLA recovery of RCRA costs by noting that the determination of whether particular RCRA costs are recoverable as substantially consistent with the National Contingency Plan is made after those RCRA costs are actually incurred. (See Dkt. No. 1477 at 10.) This is of course true, but this fact in no way preempts a party's right to plead a claim for such recovery to be had when, and if, such

recoverable costs are actually incurred. Plaintiffs cite no case law suggesting that a party in the Cargill Defendants' position cannot successfully plead such a claim. (See id. at 9-10.)

If the Court does not permit the Cargill Defendants to assert recoverable RCRA costs as part of their contribution counterclaim in the present action, the Cargill Defendants will lack a complete remedy to compel Plaintiffs to pay for those portions of any RCRA costs for which Plaintiffs are responsible. The Cargill Defendants' proposed counterclaim seeking contribution under CERCLA § 113(f) for all recoverable response costs asserts a plausible claim, and the Court, in the interest of justice, should grant leave to assert it. See Shero, 510 F.3d at 1200.

2. The Cargill Defendants' proposed state law counterclaims are not futile.

Plaintiffs likewise fail to point the Court to a single case or provide any analysis to support their declaration that the proposed Oklahoma contribution counterclaims are somehow futile. (Dkt. No. 1477 at 10.) In keeping with the Supreme Court's discussion of the meaning of "contribution" under § 113(f), the Cargill Defendants seek to add the common law contribution counterclaims as a parallel to the CERCLA § 113(f) counterclaims. See Atlantic Research, 127 S. Ct. at 2337-38. As described in the initial brief, OKLA. STAT. tit. 12, § 832 is taken verbatim from the Uniform Contribution Among Tortfeasors Act ("UCATA"). Atl. Richfield Co. v. Am. Airlines, Inc., Case No. 89-C-868-B, 89-C-869-B, 89-C-859-B, 1993 U.S. Dist. LEXIS 20278, at *45 (N.D. Okla. Aug. 3, 1993). Under Atlantic Research, parties may file counterclaims for UCATA contribution for equitable apportionment of cost recovery liability in addition to asserting § 113(f) counterclaims for contribution. United States v. Sunoco, Inc., 501 F. Supp. 2d 656, 664 (E.D. Pa. 2007) (citing Atlantic Research, 127 S. Ct. at 2339). To whatever extent the Cargill Defendants are unable to collect the full equitable share of costs from Plaintiffs through CERCLA, the Cargill Defendants are entitled to invoke OKLA. STAT. tit. 12, § 832 to recover

outstanding contribution amounts, if any. As this is, again, a plausible claim, the Court should grant leave to amend.

CONCLUSION

For all the above reasons, and as Plaintiffs offer no sustainable reason not to grant leave to amend, the Court should allow the Cargill Defendants to file their proposed CERCLA and associated Oklahoma law counterclaims, found at Docket Nos. 1450-2 and 1450-3.

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CERTIFICATE OF SERVICE

I certify that on the 11th day of February, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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